



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 9 OF 2015
FAST TRACK

RAIN DROPS LIMITED PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KILIFI DEFENDANT

RULING

The application dated 29th June, 2016 seeks the following orders: -

a) THAT the court be pleased to certify this matter as urgent.

b) THAT pending the hearing and determination of both this application and this suit and or further direction of the court, an order do issue directing the defendant/respondent and failing compliance then the Branch Manager of CHASE BANK KENYA LIMITED, MALINDI BRANCH and or any other relevant officer of the said Bank to immediately release the plaintiff/applicant's their unpaid share of the collections balance due in the sum of Kenya Shillings Ninety Eight Million One Hundred Seventy Four Thousand seven Hundred seventy two and Fifty Four Cents (Kshs.98,174,772.54) held in the 2 Escrow Accounts at CHASE BANK, MALILNDI BRANCH operated under the names COUNTY GOVERNMENT OF KILIFI CESS and COUNTY GOVERNMENT OF KILILFI PARKING Account Numbers 0198094843001 and 0198094843002 respectively and or any sum or amount that remains in the escrow account operated by the parties in this suit in the apportionment agreed upon (30%) plus VAT being the plaintiff/applicant's share plus salaries at the rate of Kshs.3,969,015.00) and as set out in the agreement between the parties plus all salaries payments and to continue to do so every calendar month henceforth on or before the 5th of every succeeding month henceforth and without any delay. For the avoidance of doubt, this order shall apply to all amounts currently deposited into the said bank accounts and thereafter to any and all or any further amounts that will continue to be deposited into the said Bank Accounts (of which 30% plus VAT thereon plus salaries reimbursement at the rate of Kshs.3,969,015.00) shall be released to the plaintiff/applicant as herein provided on a monthly basis) on or before the 5th of every succeeding month until further orders of the court and for the further avoidance of doubt the payments shall be effected unilaterally by the Branch Manager of chase Bank, Malindi branch or any other relevant officer of Chase Bank Kenya Limited without an further reference to any

party if by the 5th of every succeeding month the defendant/respondent has failed to comply with the orders of this court and effect the payments;

c) THAT if the amounts available in the aforesaid Chase Bank Accounts are not sufficient to cover the plaintiff/applicant's claim as above stated, then an order is hereby issued for the entire amounts held in the Chase Bank Escrow Accounts above identified be released forthwith to the plaintiff/applicant and any short fall remaining of the claim of the total claim of Kshs.98,174,772.54 is further ordered to be released to plaintiff/applicant from the defendant/respondent's 2 KENYA COMMERCIAL BANK ACCOUNTS NUMBERS 11175862053 AT KILIFI and NUMBER 1175862436 at Kilifi and in case the funds have been moved then the same be recovered from the defendant/respondent's share of future collections banked at the Chase Bank Escrow Accounts described in prayer (b) hereinabove till recovery in full, all such amounts as required to be paid to be communicated to Chase Bank by plaintiff/applicant and paid directly to them out of the amounts being deposited into and becoming available in the aforesaid Escrow Accounts by the aforesaid Chase Bank, Malindi.

d) THAT as the plaintiff/applicant's claim for Kshs.98,174772.54 is for the accounting period only up to 30TH MAY 2016 this court further orders that all revenues collected from 1ST JUNE 2016 onwards ought to be apportioned as stated hereinabove in the receding paragraphs and upon full recovery of the plaintiff/applicant's dues aforesaid then to continue to be apportioned in such a manner as to ensure that the plaintiff/applicant is paid 30% of all monthly revenues collected plus VAT thereon at the rate of 16% thereon plus Kshs.3,969,015.00 being salaries payable to the over 218 employees per month every month and released to them from the above describe Escrow Accounts by the said Chase Bank Malindi directly and not later than on the 5th day of every succeeding month until further order of this court.

e) THAT this court to henceforth be seized of this matter and proceed to hear and determine the same t its logical lawful conclusion;

f) THAT the status quo be maintained and the plaintiff/applicant do continue to operate and collect all revenues and deposit them into the joint escrow accounts usual pending the hearing and determination of the suit;

g) THAT the defendant/respondent do pay the costs of this application.

The application is supported by the affidavit of JOSEPH MUNYOKI **Nzioka** sworn on 4th July, 2016. The respondent filed a replying affidavit sworn by BENJAMIN KAI CHILUMO on 2nd August, 2016.

Mr. Taib appeared for the applicant while Mr. Kithi appeared for the defendant. I have read the supporting affidavit as well as the affidavit in reply by Mr. Benjamin Chilumo Chai. The submissions by both counsels are a summary of the contents of the two affidavits.

Mr. Taib maintains that although the parties were referred to arbitration by the court it has not been possible to hold negotiations in good faith. The plaintiff cannot operate without receiving its 30% share of the collected revenue. The plaintiff has provided the defendant with its statement of accounts but the defendant has not provided any accounts to counter those of the plaintiff. It is further submitted that the application ought to be granted so that each party can continue receiving its due share instead of seeking the court's intervention all the time. No prejudice shall befall the defendant.

Counsel for the plaintiff further submitted that according to the agreement, where parties fail to settle a dispute, the same can be settled by the court. The plaintiff has not been overpaid. According to the plaintiff, there is no proof that only Kshs.202 million has been collected. The statement provided by the plaintiff is a cumulative record and the amounts paid as a result of court orders did not represent the exact amount due to the plaintiff. The claim for Kshs.98 million is upto end of May, 2016.

Mr. Taib stated that the defendant collects revenue directly from three cement companies, banks it and has not accounted for it. The plaintiff has only been receiving part payment through orders of the court. The contract is for 15 years and is still running. Any overpayment can be recovered. Once Kshs.98 million is paid, the parties will start from a clean slate as from the end of May, 2016. Had the defendant been paying the plaintiff monthly, the question of paying the amount being claimed could not have arisen. The plaintiff company is worth over Kshs.100 million and can repay any alleged overpayment.

Mr. Kithi on his part opposed the application. Counsel submit that the statement of accounts and the supporting documents were generated by a computer. These are not primary documents. The plaintiffs have not filed any certificate of compliance as required by section 65 of the Evidence Act, Cap 80 Laws of Kenya.

Counsel further submit that the application is defective. There is no knowledge on how the documents were generated. No certificate has been filed to confirm to the court that the computer from which the documents were generated was working. The plaintiff admit that without the payments it cannot operate. This is proof of lack of capacity to undertake the work. The applicant is unable to meet its obligations under the contract. When it applied for the contract, it ought to have known that disputes were going to occur.

It is Mr. Kithi's position that the agreement was terminated. What has been paid in between after the termination is a nullity. The plaintiff has not demonstrated that it has physical assets that can be used to settle any over payment. Any further withdrawals will highly prejudice the defendant. The court allowed a payment of Kshs.35 million and directed that there should be no more further payments. The auditor General has raised audit queries on the payment and how the revenue has been applied. The best way forward would have been to ask for an audit where both parties will be involved. The money belongs to the public and the plaintiff is merely an agent. The plaintiff does not indicate how much they have been paid. This is an issue involving accounting dispute and can only be settled by a professional auditor. Allowing the payment would be aiding an illegality. The plaintiff has not proved its claim by its own provided statement of accounts. The court cannot be the one administering the contract.

The dispute herein can be traced to an agreement entered into between the two parties on 20th February, 2014. The agreement was subsequently amended on 4th July, 2014. Under the terms of the agreement, the plaintiff was to collect cess and parking fees in Kilifi County on behalf of the County Government of Kilifi. The plaintiff was to setup mechanism and machines that would have been used in the process of collecting the revenue. The plaintiff was to be paid 30% share of the gross revenue collected each month. Paragraph 6.3 of the agreement anticipated that the revenue would have increased from Kshs.123 million to Kshs.766 million each year. That exponential increase was to be achieved within two years.

The agreement provided in details on how the two parties were to operate. Paragraph 21 provide that the County Government was to second staff to the plaintiff. The County Government was to be responsible of payment of the salaries and allowances of the seconded employees.

On 16th February, 2015, less than one year after the signing of the amended agreement, the defendant opted to terminate the agreement. The termination is the source of the dispute between the parties. Several applications have been heard by this court. I have personally delivered not less than four rulings in this matter. The court directed the parties to go to arbitration but that directive was not followed. Under the terms of the agreement, if certain disputes are not settled within forty five (45) days, they can be referred to the court for settlement (paragraph 27.3).

My understanding of the current application is that the plaintiff is seeking to be paid its cumulative share of the revenue. According to the plaintiff, although the court has been making orders to have payment released to cover its 30% share under the terms of the agreement, what has been so far released is part payment. The plaintiff is now seeking its balance of the revenue as at the end of May, 2016. It is also the plaintiff's position that since the signing of the agreement, the defendant has been directly collecting cess from three cement companies and banking it. The plaintiff has not received its share of that part of revenue. There is also the element of salaries for the staff deployed to collect the revenue. The plaintiff

maintains that the defendant has not been paying the staff and this makes its operations to be difficult. According to the plaintiff, the defendant has been deliberately refusing to sign the relevant documents necessary for the release of its 30% share with the sole intention of crippling the plaintiff's operation.

On its part, the defendant contends that the plaintiff has been overpaid. The revenue collected is public money and should benefit the public. The contract was terminated and all what has been paid to the plaintiff from the date of termination is illegal. That is to say payments made after February, 2015 are not lawfully due to the plaintiff. It is further maintained by the defendant that it has been ready to go to arbitration but the plaintiff has frustrated that line of dispute resolution.

According to the defendant, the Auditor General, a creature of the Kenyan Constitution, has raised queries on the payments to the plaintiff. The plaintiff has admitted that it is having financial problems and therefore cannot be entrusted with a further payment as it will be unable to refund any overpayment. It is the defendant's position that the statements of accounts provided by the plaintiff do not represent the correct position.

The main issues to be considered by this court is whether the plaintiff has been overpaid, whether the plaintiff should get a share of the revenue collected by the defendant, that is the sum of Kshs.82 million, and what is the best way forward.

The plaintiff's position is that it has not been overpaid. The court made provisional payments. The tabulation by the plaintiff starts from April, 2014 to May, 2016. This is a period of two years. The initial agreement was signed on 20th February, 2014. The plaintiff's tabulation therefore captures most part of the agreement excluding February and March, 2014. I have gone through the two page statement by the plaintiff. Behind each amount being claimed there are invoices sent to the defendant for settlement. Contrary to the defendant's claim that what has so far been paid has not been captured, the statement gives a full account of what was paid as revenue and what is outstanding. The only issue on the statement is the amount claimed as payments by the cement companies. I will revert to this claim in my ruling.

The plaintiff attached a letter dated 28th April, 2015 seeking payment of cumulative arrears of Kshs.37,499,989.60. The plaintiff sent the last invoice on 9th June, 2016 for the period of April and May 2016 for parking fees and cess. The defendant did not make any allegations that the fee notes are exaggerated or that they do not represent the amount collected during the period in question. The invoices are accompanied by a breakdown of the amount collected from each collection point from the beginning to the end of the month. The tabulation also shows the daily bankings in the two escrow accounts.

The defendants maintain that the plaintiff has been paid about 46% of the amount collected. This represents a 16% difference as the plaintiff is entitled to 30% share. I am certain that the 46% includes the amount paid as salaries to the staff. Under the terms of the agreement, the staff were to be seconded to the plaintiff. Had the plaintiff maintained those staff in their pay role, this issue could not have arisen. The plaintiff is forced to pay the staff as they are the ones collecting the revenue.

The defendant did not file any document challenging the statement by the plaintiff. There is no contention that the amounts allegedly deposited in the account was not paid. It is difficult for the court to simply conclude that the plaintiff's claim is false in the absence of any contradictory information. The record is quite clear to the effect that this court had to order payment of the plaintiff's share from the escrow accounts. There is no evidence of overpayment. The defendant could have filed a tabulation for all what went into the escrow account for the two years period, what was paid to the plaintiff and indicate whether there is overpayment. The figure of Kshs.202 million is not supported by any bank deposits. In the period the defendant collected the revenue, Kshs.82 million was collected. This is a period of about five months. It is clear to me that the revenue collection for the period of the agreement is not Kshs.202 million. I do find and hold that there is no overpayment to the plaintiff according to the information so far provided. The plaintiff's tabulation show that the plaintiff's 30% share during the period was supposed to be Kshs.256,150,867/= . Kshs.157,976,095/= was paid leaving a balance of the sum of Kshs.98,271,772/= being claimed.

On 17th September, 2015, this court allowed the defendant to collect the revenue. This order was reversed on 25th February, 2016 after the plaintiff alleged that the amount collected was not being deposited in the escrow account. The order of 17th September, 2015 did not mean that the agreement between the parties had been nullified. The agreement is still subsisting. That is why this court allowed the plaintiff to resume the collection of the revenue in February, 2015. The defendant contends that the plaintiff is not entitled to the amount of Kshs.82 million deposited at the defendant's Kenya Commercial Bank Accounts. The reasoning for that contention is that the plaintiff did not collect that income.

The decision to allow the defendant to collect the income was informed by the defendant's persistent contention that the agreement simply empowers the plaintiff to supervise the collection and not to collect the revenue. That position does not mean that when the defendant collects the revenue, the plaintiff is excluded from getting its 30% share. Whoever collects the revenue, the amount has to be shared as per the agreement. The plaintiff is therefore entitled to its 30% share until the agreement is brought to an end. The amount deposited in the KCB accounts is for the benefit of both parties

There is the side issue as to whether any payments to the plaintiff are a nullity. It is quite clear that the defendant attempted to terminate the agreement. This court issued a temporary injunctive order on 20th February, 2015 restraining the defendant from terminating the agreement. The above order was occasioned by the plaintiff's application dated 19th February, 2015. This court subsequently allowed the plaintiff's application. The sum total of that is that the agreement has not been terminated. That is why parties were referred to arbitration. What is existing is a dispute. The dispute has not been resolved.

All what is being collected as revenue is being collected within the terms of the agreement. There is no unlawful payments to the plaintiff. Indeed it is the plaintiff collecting the revenue. The plaintiff cannot be collecting the revenue unlawfully. The defendant's decision to terminate the agreement was stayed by the court. Upon the determination of the dispute, final accounts will be taken. The agreement provides that the infrastructure put up by the plaintiff shall be bought by the defendant.

There is the subsidiary issue of cess collected from three cement companies namely Bamburi cement, Athi River Mining and Mombasa Cement. The tabulation by the plaintiff indicate that in November, 2015, an invoice showing the variance in collection from the cement companies was sent. The figure indicated is Kshs.85,417,500/=. The amount due to the plaintiff is Kshs.25,625,250/=. There is also a claim of Kshs.82,257,285.40 being collection from cement companies for the period December, January and February, 2016. The tabulation indicates a claim of Kshs.24,677,185/= out of the sum of Kshs.82,257,285.40.

The supporting documents provided by the plaintiff contain an invoice dated 19th November, 2015. It is titled "*Invoice of Cess Underpaid from Cement Factories*". The invoice states as follows: -

RE: INVOICE OF CESS UNDERPAID FROM CEMENT FACTORIES

Attached please find an analysis table and our invoice No. 10 of cess amounts paid at subsidized rates by cement factories since the gazetment of the new rates in February 2015 namely, Athi river Mining, Bamburi Cement and Mombasa Cement amounting to Kshs.29,725,290.17 (twenty nine million seven hundred twenty five two hundred ninety cents seventeen only) for your perusal and quick processing of our payment;

NOTE: The same is quoted in the contract agreement under clause 10.8.

The accompanying tabulation gives the difference between what was paid at subsidized rate and what ought to have been paid at the gazetted rates. The total variance is given as Kshs.85,417,500.50. The details of the tonnage are given. Under clause 10.8 of the agreement the defendant is not supposed to exempt anyone from paying revenue. Should exemption be granted, the plaintiff shall still be entitled to its 30% share of what the exempted tax payer could have paid. A list of all exempted tax payers is to be provided. It is not clear why the cement factories are not paying the cess according to the gazetted rates.

Any discount given by the defendant amounts to exemption under clause 10.8 of the agreement.

It is evident that the invoices for the 30% share of the income from the cement factories were sent. There is no dispute about the tonnage being charged as officers from those companies have signed some documents confirming the tonnage. The amount collected from the cement companies seems not to have been banked in the escrow accounts. The plaintiff is now demanding its share. It is also clear that the defendant has not been collecting the revenue from the cement factories as per the gazetted rates. The plaintiff is entitled to claim its lawful share as the proper rates are known. I do find that the plaintiff's claim of the income from the cement companies is proper and payable.

Lastly, on the way forward, it is established by the manner in which the parties have been operating that the two parties cannot work together unless they openly decide to change their current respective positions. Although the court directed the parties to go for arbitration, no meaningful attempts were made. The defendant seems to have decided that it will not sign its part for the release of the plaintiff's 30% share of the revenue. The court has been giving orders allowing the plaintiff to receive part of its share. Had the defendant been undertaking its part under the terms of the agreement, the court would not have given such orders. All what the defendant has to do is to sign the relevant documents so that each party can take its share. That would mean come the beginning of each month, the escrow accounts would be cleared of the previous month's collection and start from a zero balance. The defendant's contention that the plaintiff always makes such applications wherever there is money in the account does not arise. It is the defendant who has persistently refused to release the plaintiff's share and take its own share.

It should be known by the Kilifi citizen that its County Government entered into a revenue collection agreement with the plaintiff. The plaintiff is not robbing the citizen of Kilifi County of their money. All what the plaintiff is claiming is its fair share under the terms of the agreement. Should the defendant agree to share out each month's collected revenue amicably, the agreement would have operated smoothly and the expected yearly revenue of Kshs.766 million might have been achieved. For two years parties have been wrangling and the environment has not been conducive for revenue collection. It is difficult to evaluate the plaintiff's performance under the prevailing circumstances.

The best way forward is for the dispute to be determined by the court. The court can hear all the parties and make a determination as to whether the contract should be terminated or not. Having heard the several applications by the parties, I do find that the best way forward is for another judge to hear the dispute. In view of the urgency of the matter, taking into account the fact that the defendant has to increase its revenue collection and this cannot be achieved under the prevailing conditions, the matter has to be heard by a court that has ample time and less workload. The judge in Garsen High Court is well placed to hear the dispute. I do hereby recuse myself from hearing this dispute any further and refer the matter to the Garsen High Court for hearing and final determination.

I am certain that during the pendency of the hearing, the plaintiff will not receive its 30% share of the revenue. This might call for filing of similar applications and that would prolong the dispute. This calls for the grant of prayer (d) of the plaintiff's application so that the collected monthly revenue is apportioned and shared out to each party as prayed. It is also evident that the defendant will not share out the sum of Kshs.82 million in its two Kenya Commercial Bank accounts. The plaintiff is entitled to 30% of that amount.

It should be clear that the sum of Kshs.98 million being claimed is not entirely the 30% share of the plaintiff. There is the element of salaries. Paragraph 18 of the supporting affidavit of Joseph Munyoki Nzioka is quite clear that the amount being claimed include staff salaries. I have seen several invoices for staff salaries. On 31st May, 2016, an invoice for Kshs.7,805,670/= (invoice No. 008) was sent to the defendant being two months salaries. The details of each individual staff's pay is attached. On 19th November, 2015, invoice No. 005 for Kshs.3,060,901/= being staff salaries for October was sent with supporting individual staff's emoluments. On 11th October, 2015, an invoice for Kshs.3,414,600/= being staff salaries for September, 2015 was sent. There is invoice No. 004 of 16th September, 2015 for August, 2015 salaries totaling Kshs.3,043,040/= which exceeds Kshs.3 million each month. In short, the amount being claimed includes the component of staff salaries. This is a different component under the

terms of the agreement.

In the end, the plaintiff's application dated 29th June, 2016 is granted as prayed. This court made an interim award of Kshs.20 million. This leaves a balance of Kshs.78,174,772.54. The amount covers up to end of May, 2016. Prayer (e) of the application seeking to have this matter heard by this court is not granted. Instead, this court directs that the dispute herein be heard by the Garsen High Court as I hereby recuse myself from hearing the case. Costs shall follow the outcome of the main suit.

Dated and delivered in Malindi this 21st day of September, 2016.

S.J. CHITEMBWE

JUDGE